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22 CFR Parts 120 and 121

[Public Notice: 11918]

RIN 1400-AE27

International Traffic in Arms Regulations: Consolidation and Restructuring of Purposes and Definitions - Final

AGENCY: Department of State.

ACTION: Final rule.

SUMMARY: The Department of State published an interim final rule on March 23, 2022, effective September 6, 2022, amending the International Traffic in Arms Regulations (ITAR) to better organize the purposes and definitions of the regulations. After reviewing the comments received in response to that interim final rule, the Department is now responding to public comments and finalizing the interim final rule, including making minor amendments.

DATES: This rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Sarah Heidema, Director, Office of Defense Trade Controls Policy, Department of State, telephone (202) 663-1282; email DDTCCustomerService@state.gov. ATTN: Regulatory Change, Consolidation of Definitions and Restructuring of Part 120 - Final.

SUPPLEMENTARY INFORMATION: The Directorate of Defense Trade Controls (DDTC), U.S. Department of State, administers the International Traffic in Arms Regulations (ITAR) (22 CFR parts 120 - 130). The regulations, codified as subchapter M of chapter I, title 22 of the Code of Federal Regulations ("the subchapter") implement those authorities of the Arms Export Control Act (AECA) (22 U.S.C. 2751 *et seq*.) delegated to the Secretary of State pursuant to Executive Order 13637. On March 23, 2022, the Department published an interim final rule at 87

FR 16396, with an effective date of September 6, 2022 (the interim final rule), to restructure part 120 of the ITAR to better organize the definitions previously found in that part and other locations throughout the ITAR and to consolidate provisions that provide background information or otherwise apply throughout the regulations. In addition, the interim final rule added text not previously found in the ITAR and made clarifying revisions to existing text. In that interim final rule, the Department requested comments from the interested community. The Department now provides responses to those comments and amends the ITAR through this final rulemaking.

Before the Department addresses comments received in response to the interim final rule, it notes that beginning with 85 FR 25287, May 1, 2020, as warranted by "the exceptional and undue hardships and risks to safety caused by the public health emergency related to the SARS-COV2 pandemic," DDTC provided, via a series of notices in the *Federal Register*, for certain temporary suspensions, modifications, and exceptions to facilitate telework. The final document in that series, 86 FR 30778, June 10, 2021, provided, pursuant to ITAR §§ 126.2 and 126.3, "a temporary suspension, modification, and exception to the requirement that a regular employee, for purposes of ITAR § 120.39(a)(2), work at the company's facilities, to allow the individual to work at a remote work location, so long as the individual is not located in a country listed in ITAR § 126.1" and "a temporary suspension, modification, and exception to authorize regular employees of licensed entities who are working remotely in a country not currently authorized by a technical assistance agreement, manufacturing license agreement, or exemption to send, receive, or access any technical data authorized for export, reexport, or retransfer to their employer via a technical assistance agreement, manufacturing license agreement, or exemption so long as the regular employee is not located in a country listed in ITAR § 126.1." DDTC confirms that the temporary suspensions, modifications, and exceptions provided in 86 FR 30778, June 10, 2021, remain in effect until such time as a document is published in the *Federal*

Register explicitly terminating each, notwithstanding the movement of former ITAR § 120.39 to new § 120.64 by republication of ITAR part 120 in the interim final rule.

Response to Comments

One commenter expressed appreciation for the Department's efforts and anticipates a positive impact on compliance and the security and foreign policy interests of the Department. Another commenter noted the changes make the regulations noticeably more accessible to readers.

One commenter requested that the policy statement regarding registration requirements at new § 120.13 be amended to include in paragraph (b) specific reference to available exemptions to registration at §§ 129.2 and 129.3. The commenter further suggested such inclusion would better harmonize the language of § 120.13(b) with § 120.14(c). The Department believes that it would enhance the clarity of § 120.13 to include reference to available exemptions to the registration requirement in part 129, as per the commenter's suggestion, as well as in part 122, and includes a new paragraph (c) to § 120.13 noting the availability of exemptions to the registration requirements.

One commenter recommended the Department include definitions of end-use and end-user in Subpart C to part 120 and stated that "[u]nderstanding how DOS defines the terms used in the ITAR is imperative to complying with the ITAR's requirements." The Department will take the recommendation under consideration. Because the Department's stated aim in the interim final rule was focused on movement and consolidation, it is not adding the proposed definitions at this time.

One commenter noted that new § 120.12, describing the procedure by which a requestor can obtain a commodity jurisdiction (CJ) determination as to whether a particular article or service is covered by the USML, consistently uses the term "determination". The commenter further noted the distinction between determination in the CJ process and designation as used regarding identification of defense articles and services on the USML. The commenter recommended

additional revisions, including to §§ 120.2 and 120.3, to similarly distinguish between designations and determinations. The Department notes that it is working to increase clarity regarding terms designation and determination, and did so where possible in the interim final rule. The preamble discussion to new § 120.12 in the interim final rule refers to that effort. The Department notes its expressed intent to limit substantive amendments and to focus on restructuring and consolidation of existing text in this rulemaking. DDTC will make note of the recommendation for consideration in future rulemaking.

One commenter requested that the second use of the term Arms Export Control Act in § 120.5 be replaced with the initialism AECA. The Department notes that the preamble to the interim final rule states the policy that acronyms (or initialisms) and parentheticals will be used where a single term capable of shortening appears "on more than two occasions within any one section." In this case, the term only appears twice, so the policy was not applied.

One commenter suggested the Department replace the word "you" where used in § 120.11 with the term "reviewer" and make other minor conforming revisions. The Department notes that while § 120.11 is the only section of the ITAR where the word "you" appears, the word is regularly used in regulation, see e.g., the Export Administration Regulations (EAR) (15 CFR parts 730-774) and Bureau of Alcohol, Tobacco, Firearms and Explosives (ATFE) regulations, (27 CFR parts 447, 478, 479, 555, and 771), and that the text of new § 120.11(a)(2) was moved directly from prior § 121.1(b). In light of the Department's stated aims to keep revisions to existing text to a minimum and because it is not aware of any confusion caused by the term since adoption, no change is being made at this time.

One commenter recommended revision to the statement of policy regarding incorporation or integration of controlled items into any non-controlled item. The commenter recommended: 1) stating specifically that such items are subject to ITAR authorization requirements; and 2) where multiple controlled items are incorporated or integrated into a non-controlled item, that the item must be licensed under each applicable category. The Department notes that § 120.11(c) is a

general statement of policy and not intended to provide guidance on how to structure licenses in specific scenarios. The statement of policy is that such items do not lose controlled status because of incorporation or integration and that the items are subject to the subchapter, and all the requirements therein, including the requirement to obtain a license or other approval prior to transfer.

One commenter recommended the Department either define the term "unfavorable finding" when used in relation to Blue Lantern end-use monitoring in new § 120.18(a)(9), or otherwise remove the paragraph. The commenter stated that the significant action of denial, revocation, etc. of an authorization should not be predicated on the use of an undefined term and that the previous list of reasons for denial, revocation, etc. at former § 120.27 are sufficient to address determinations based on end-use monitoring. The Department notes that in the supporting information to the interim final rule and posted on the DDTC website there is the statement that new § 120.18(a)(9) is a "[g]eneral statement of existing policy not previously explicit." The Department confirms here that paragraph (a)(9) is an accurate statement of existing practice and is memorializing the policy as one of the factors the Department may consider when implementing its broad discretionary authority to disapprove, deny, revoke, suspend, or amend without prior notice licenses or approvals, as described in paragraphs (a)(1) and (a)(2). The term "unfavorable finding" is adequate to express the finding of an end-use monitoring check in which the Department lacks the assurances necessary to issue a license or other approval or to otherwise modify or halt controlled transactions under such an authorization. The Department's annual "Report to Congress on End-Use Monitoring of Defense Articles and Defense Services" is publicly available on the DDTC website at pmddtc.state.gov and provides additional information regarding unfavorable Blue Lantern findings.

One commenter recommended the Department add the terms executables, source code, and object code to the definition of software at § 120.40(g). The Department notes its expressed intent to limit substantive amendments and to focus on restructuring and consolidation of

existing text in this rulemaking. DDTC will make note of the recommendation for consideration in future rulemaking.

One commenter recommended the Department revise the numbering of notes to § 120.41 from notes 2 and 3 to paragraph (b) to notes 1 and 2 to paragraph (b). The Department notes that it has revised the numbering of notes in § 120.41 in accordance with the Office of the Federal Register publication requirement that all notes to a section be numbered sequentially. Similar revisions to notes to other ITAR sections can be expected in future rulemakings.

One commenter recommended the Department provide additional commentary regarding the movement of definitions of development and production from § 120.41 (specially designed) to stand alone definitions applicable to the ITAR entirely. The commenter suggested there may be unintended consequences resulting from this transition. The commenter raised two specific concerns. First, "that a party engaged only in the 'assembly and testing of prototypes' ('development') may not trigger the registration requirement in ITAR § 122.1, which requires 'only one occasion of manufacturing' for registration ('manufacture' is a subset of 'production')." DDTC acknowledges that not all persons in the United States that may come into contact with defense articles and technical data are required to register with the Department. Persons who are not engaged in the business of manufacturing, exporting, or temporarily importing defense articles are not required by § 122.1 to register. The Department, however, believes that the clarity of the expanded definition outweighs the risk that a person solely engaged in assembly of products in development, and no other controlled activity, would no longer register with the Department.

Second, the commenter suggested that there may be an unintended reduction in the scope of technical data designated as Significant Military Equipment (SME). The commenter was concerned that "technical data associated with 'development' activities such as 'assembly and testing of prototypes' would not be treated as SME, even if virtually indistinguishable from the data eventually used in 'production' activities, including manufacture." The Department notes

that it considered the impact of movement of definitions to universal application and that the language of new § 120.10(c) is not new or revised. The same language appears in the former § 121.1(a)(2) and has been included in various sections of the ITAR since at least 1993. The movement of the definition of development from Note 2 to paragraph (b) of § 120.41, where it was limited to "specially designed", to a single instance definition applicable to the entire subchapter at § 120.43 does not alter the relationship between the language of § 120.10(c) (formerly § 121.1(a)(2)) and the definition of technical data at § 120.33 (formerly § 120.10). The Department notes that the limitation to manufacture and production in § 120.33 (formerly § 120.10) is unchanged by this rulemaking. Technical data that is not directly related to the manufacture or production of a defense article designated as SME is not designated as SME. In this respect, however, the Department notes that technical data associated with development activities, such as assembly and testing of prototypes, that is indistinguishable from technical data used in manufacturing or production activities would be directly related to the manufacture or production of a defense article and therefore would be designated as SME if the defense article is SME. The Department further notes that the definitions of development and production identify the point at which a commodity transitions from development to production, and the point at which it subsequently re-enters development, as those terms are used in multiple locations within the regulation to reference specific points in the manufacturing process. The Department is not defining manufacture at this time. For these reasons, the Department is not revising the text of the interim final rule.

One commenter requested the Department provide notice through *Federal Register* document or an FAQ that existing authorizations do not require an immediate update but can be updated at the next "major revision" and that DDTC allow submissions with citations to outdated sections where the intent of the reference is clear for at least six months after the effective date of this rule. The Department notes that it provided a six-month delayed effective date for this rule to allow regulated entities time to accommodate the revisions. The Department further notes that it

is aware that existing agreements may have citations to ITAR sections effective at time of approval and had DDTC intended to require immediate amendments to revise outdated citations in all existing agreements, it would have so instructed in the interim final rule. Therefore, while the Department is not requiring existing authorizations to be amended merely to effect citation revisions, it expects submissions for licenses and other approvals received after the effective date of the rule to reference the ITAR as effective at the time of submission.

In addition to comments addressed above, the Department received comments outside the scope of this rulemaking, including comments proposing substantive revisions to existing text, including text not otherwise moved or amended by this rule. As the rule "moves and reorganizes existing regulatory text without revision" wherever possible for the purpose of organizational clarity, the Department takes note of these comments, but is not entertaining substantive revisions to existing text in this rulemaking.

Amendments

In § 120.13, for the reasons described above, the Department adds a new paragraph (c) to provided notice of the availability of exemptions to registration.

In § 120.40(g) (formerly found at § 120.45(f)), the Department amends the final clause of the second sentence to revise reference from "a technical data license" to "a license." This revision is in accordance with a future rulemaking, RIN 1400-AE26, to revise descriptions of licenses in order to bring usage into better conformity with the definition of license at § 120.57(a) (formerly found at § 120.20) and the approved information collections from which licenses are issued, and which was not included in that rulemaking. In § 121.1, the Department amends Category XIII(l), by correcting the closing parenthetical to the paragraph by removing an errant close parenthesis within the parenthetical.

REGULATORY ANALYSIS AND NOTICES

Administrative Procedure Act

The Department of State is of the opinion that controlling the import and export of defense articles and services is a military or foreign affairs function of the United States Government and that rules implementing this function are exempt from sections 553 (rulemaking) and 554 (adjudications) of the Administrative Procedure Act (APA), pursuant to 5 U.S.C. 553(a)(1). Since the Department is of the opinion that this rule is exempt from 5 U.S.C 553, it is the view of the Department that the provisions of section 553 do not apply to this rulemaking.

Regulatory Flexibility Act

Since this rule is exempt from the notice-and-comment provisions of 5 U.S.C. 553(b), it does not require analysis under the Regulatory Flexibility Act.

Unfunded Mandates Reform Act of 1995

This rulemaking does not involve a mandate that will result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any year and it will not significantly or uniquely affect small governments. Therefore, no actions are deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Congressional Review Act

The Department does not believe this rulemaking is a major rule within the definition of 5 U.S.C. 804.

Executive Orders 12372 and 13132

This rulemaking will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this amendment does not have sufficient federalism implications to require consultations or warrant the preparation of a federalism summary impact

statement. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this rulemaking.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributed impacts, and equity). Because the scope of this rule does not impose additional regulatory requirements or obligations, the Department believes costs associated with this rule will be minimal. This rule has been designated a "significant regulatory action" by the Office and Information and Regulatory Affairs under Executive Order 12866.

Executive Order 12988

The Department of State reviewed this rulemaking in light of Executive Order 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

Executive Order 13175

The Department determined that this rulemaking will not have tribal implications, will not impose substantial direct compliance costs on Indian tribal governments, and will not preempt tribal law. Accordingly, the requirements of Executive Order 13175 do not apply to this rulemaking.

Paperwork Reduction Act

This rule does not impose or revise any information collections subject to 44 U.S.C. chapter 35.

List of Subjects

22 CFR Parts 120 and 121

Arms and munitions, Classified information, Exports.

Accordingly, for the reasons set forth in the preamble and under the authority of 22 U.S.C. 2778, the interim final rule amending title 22, chapter I, subchapter M, which was published at 87 FR 16396 on March 23, 2022, is adopted as final with the following changes:

PART 120—PURPOSE AND DEFINITIONS

1. The authority citation for part 120 continues to read as follows:

Authority: 22 U.S.C. 2651a, 2752, 2753, 2776, 2778, 2779, 2779a, 2785, 2794, 2797; E.O. 13637, 78 FR 16129, 3 CFR, 2013 Comp., p. 223.

2. Amend § 120.13 by adding paragraph (c) to read:

§ 120.13 Registration.

* * * * *

(c) The registration requirements as set forth in parts 122 and 129 of this subchapter include limited exemptions.

§ 120.40 [Amended]

3. In § 120.40 paragraph (g), remove the phrase “a technical data license” and add in its place “a license”.

PART 121—THE UNITED STATES MUNITIONS LIST

4. The authority citation for part 121 continues to read as follows:

Authority: 22 U.S.C. 2752, 2778, 2797; 22 U.S.C. 2651a; Sec. 1514, Pub. L. 105-261, 112 Stat. 2175; E.O. 13637, 78 FR 16129, 3 CFR, 2013 Comp., p. 223.

§ 121.1 [Amended]

5. In § 121.1, Category XIII, paragraph (l), remove the phrase “(see § 120.32) of this subchapter)” and add in its place “(see § 120.32 of this subchapter)”.

Bonnie Jenkins,

Under Secretary,

Arms Controls and International Security,

Department of State.

Billing Code: 4710-25

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